No. 12521

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PORTLAND-COLUMBIA LUMBER CO.,
a corporation,

Appellant,

vs.

J. W. FEAK, d/b/a J. W. FEAK MERCANTILE COMPANY,

Appellee.

BRIEF FOR APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

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STATEMENT OF FACTS

Deeming the statement of facts in appellant's brief to be incomplete and, in some of its conclusions at least inaccurate, appellee elects to make his own statement.

Through a series of letters (R. 117 to 123) appellee agreed to sell and appellant agreed to buy twenty carloads of rough unfinished green lumber at a price of

$44.00 per thousand f.o.b. on the cars. The contract did not call for any particular grades but, as was stated in a letter written by counsel for appellant on March 8, 1947, appellee agreed "to accept 1-inch, 2-inch, 3-inch or 4-inch lumber so long as each car consists entirely of one thickness only." (R. 119.) It was also specifically agreed that the lumber might be of random or unspecified length and width (R. 120-123). It will thus be seen that there was no definite limitation placed upon appellee concerning the percentage of the cars which would be of any specified thickness. This was left largely to his discretion for the reason, as is shown in the letters, a quicker delivery of 4-inch lumber commonly known as cants could be procured than 1-, 2-, and 3-inch lumber (R. 122). Appellant first sought to obtain a binding delivery date of thirty days (R. 118) but appellee would not agree to this (R. 120). It may be admitted that it was contemplated that delivery would be made as soon as reasonably possible.

Appellee was not a manufacturer of lumber and did not own or operate any mills. The shipping point for the lumber which was to be furnished and which was the same area from which appellee had obtained other lumber for appellant, was Rochester, Washington. As soon as the contract was made appellee went to certain woods mills in this area and contracted for this lumber, and in many instances made payments in

advance so that the operators of these mills could finance their operations (R. 61). These so-called woods mills were in reality not sawmills in the generally accepted industrial sense but usually consisted of one power saw and a carriage which pushed the log into the saw, often with nothing but a roof over them. They had no planers or edgers and without such installation they could only cut 4-inch lumber (R. 60). To obviate this, in some instances, appellee financed the purchase of additional equipment for such woods mills (R. 67-68.)

Appellee shipped two carloads of 4-inch lumber, which was received and for which payment was made. He had two additional cars of 4-inch lumber at the railroad siding immediately ready for shipment and also about 5 cars of 1- and 2-inch lumber ready for shipment (R. 70). Sometime between March 20th and March 30th he called on Rothstein, the president of appellant, in Portland and asked shipping instructions concerning the 4-inch lumber which he had ready for shipment and which under the contract he was required to ship to such places as might be designated by Mr. Rothstein. He testified that Mr. Rothstein told him "he wouldn't take any one or two or three or four or anything else." (R. 70.) Thereupon appellee communicated by telephone with one Powers, a Portland attorney who had more or less acted as appellant's representative in

the matter (R. 70 and 116). Thereafter some general discussion was had between the parties, the exact nature of which is not revealed by this record. In any event, it does appear that the discussion continued until May 15, 1947, because there is in the record a letter dated June 3, 1947, from appellee to appellant's counsel, which letter refers to a letter dated May 15th from appellant's counsel, Mr. Reinhardt, to appellee (R. 115-116).

Thereupon appellant began to resell this lumber. The first sale of 232,078 feet was made on June 9th at a price of $32.50 per thousand and the last sale on August 5th. As is correctly stated in appellant's brief (page 3) most of the lumber was sold at a price of $40.00 per thousand.

Concerning the circumstances of the resale, appellee testified as follows: (R. 72).

> "I watched the lumber market which had gone into a decline. I tried to sell this in both Tacoma and Olympia Harbor and I tried to find other orders where I could have it remilled and disposed of and I finally sold, months later, the lumber that I had transported to Tacoma. I had no place to leave it by the mill sites."

He then testified that he finally sold the lumber to a concern in Bucoda and the Olympia Harbor Lumber Company, and that he expended the sum of $1701.00 in extra hauling expense (R. 72-75).

Concerning the state of the lumber market at the time of the breach, he testified that "some mills were selling that same kind of lumber at the end of March and glad to get it at $35.00" (R. 74).

Appellant introduced no evidence whatsoever concerning market prices either in this area or generally in the Pacific Northwest during this time. The only disinterested witness who testified concerning market conditions was the witness Barr who was manager of Bucoda Planing Mill and had been a lumber buyer in this area since 1939 (R. 107). Barr testified that in May and June the price for rough cants, which is green lumber with a thickness of four or more inches, was from $25.00 to $35.00, depending on the lumber (R. 108). On cross-examination he further stated that the price for 1, 2, and 3 rough boards or rough dimension would be $5.00 more and would therefore range between $30.00 and $40.00 (R. 110).

When it is recollected that the lowest resale price obtained by appellee was $32.50 and that he sold most of this lumber at a price of $40.00, which was a price of $15.00 over the lowest market price and of $5.00 over the highest market price for cants and was the highest price for rough or dimension lumber, it seems clear that the witness established not only the price but the fact that appellee exercised due diligence and good faith in making the resale.

As we have noted, appellant introduced no evidence on this issue. His brief relies entirely upon the publication known as Crowe's Price Reporter, which we introduced in evidence. Appellant's brief picks from Crowe's Price Reporter certain statements as to sales made of one-inch rough boards and two- and three-inch rough dimension lumber which are in excess of the price fixed by the witness Barr. Hereafter we shall discuss Crowe's Price Reporter in greater detail, but it is sufficient to say that the witness Barr in his cross-examination showed clearly the lack of materiality to the issue here of the figures set forth in appellant's brief. In cross-examining Mr. Barr (R. 111) counsel called his attention to certain portions of the Price Reporter which it was asserted showed a price in excess of that fixed by the witness. In explaining this Mr. Barr said "I would say he is correct for specified lengths. We are buying random lengths and talking about random lengths, which would be considerably less than specified lengths" (R. 112).

This Price Reporter was issued about every two weeks and covered reported prices for the preceding two weeks. The issue of April 3rd which would cover the period from about or shortly before the date of the cancellation of the order up to April 3rd is interesting, showing a price range of $38.00 to $48.00 which was a substantial drop from the issue of March 20th which

showed a price range of from $40.00 to $50.00. This probably explains the reason for the repudiation of the contract by appellant in the latter part of March.

The same issue contains the following statement concerning general market conditions in the whole Pacific Northwest as is shown by the following paragraph:

April 3, 1947.

> "The market on straight cars of green common has a very well defined leaning to weakness, as will be noted in comparing the low side of the prices here reported, as they have lost considerable ground during the past two weeks. Here again, we would like to mention that the further down the line you go in the way of service, that is the less the mill has to offer in the way of giving the buyer what he wants, the less they are having to take for their stock."

We call particular attention to the statement here that the less the mill has to offer the less it will receive. Certainly appellee was in this position when this contract was breached.

The issue of May 1, 1947, which covers the last two weeks in April has this general observation:

May 1, 1947.

> "The market for all softwoods are very definitely pointed to a weakness as is borne out by figures appearing in this issue of our Price Reporter. As was to be expected, the buyers have been

quick to take advantage of the first leverage that has been in their hands for many months. It is no longer necessary for anyone to take whatever the producer wants to furnish them in random quantities. During the past 2 weeks, the small plants having mediocre timber and limited manufacturing facilities have been first to feel price reductions that have actually hurt."

The issue of May 15, 1947, which would cover the first two weeks in May makes the following general analysis:

May 15, 1947.

"Green lumber displays the most pronounced price weakness, with no immediate signs of having struck bottom.

"The product of the all-green fir mill is the most difficult to market. An extremely small amount of merchandising activity has been reported by green plants, even those able to furnish well-manufactured lumber in excellent assortments of grade and length.

"With the fir market sinking as rapidly and erratically as it is today, it is almost impossible to point to any one price as being the market."

Then finally the issue of May 29, 1947, which would be the last two weeks in May, states:

May 29, 1947.

"During the past two weeks the green mills have made practically no sale of No. 4 common boards or dimensions, as there is no market for this grade."

When it is recollected that the appellee finally obtained a price for this lumber, which, as to most of it, was only $4.00 less than the contract price, more than due diligence would seem to be indicated.

In connection with Crowe's Price Reporter we also call attention to this explanation which is made by the editors:

> "The prices shown in this compilation are either one price on an item or a spread between two prices as determined from actual sales made by bona fide concerns prior to date of publication. No attempt is made to arrive at a mathematical average of sale prices reported to us. On the contrary, we try to place before our subscribers the prices most commonly being received on transaction made immediately prior to the time the study is conducted, by the greatest number of those contacted in each survey.
>
> "It is not the purpose or intention of this reporting service to establish a market price on any item or in any manner to influence the normal fluctuations of the lumber market."

ARGUMENT

The brief of appellant sets forth two points which are (1) that as a matter of law "the jury could not find that appellee was diligent and timely in the conduct of the resale" and (2) "that there was no evidence that appellee's alleged resales were timely or made in good faith."

We are not able to see any distinction between the two points set forth. The contention seems to be that because Crowe's Price Reporter shows certain prices during the period between April 11, 1947, and June 1, 1947, for 1, 2, and 3 rough or dimension boards of specified lengths that therefore an appellate court must hold as a matter of law, that the failure of the appellee to resell this lumber which also included No. 4 lumber at these prices was conclusive evidence of lack of good faith upon the part of the appellee. As we shall hereafter show, all the authorities cited by appellant are authorities involving situations where the uncontradicted evidence established a higher market than the resale price and also established the fact that such higher price could have been obtained. Such is not the present case.

It may be doubted whether an analysis of these various cases is necessary since their alleged application is predicated upon an erroneous assumption of fact.

Appellant's brief, page 19, quoting from Williston on Sales, states:

> "The market price may usually be proved by resale of the goods at the proper time and place and in a fair manner; but the price actually obtained at the resale is not conclusive."

The same thought is thus expressed in 46 American Jurisprudence, page 710:

"In most cases, if the sale is fairly conducted at a proper time and place and there is not evidence of mitigating circumstances or of the unfairness of the resale price, the *amount received on the resale is accepted as conclusive on the question of market value* of the subject matter of the sale, and the measure of the seller's recovery in an action against the buyer for the damages is the difference between the agreed price and the amount received on the resale, plus the expenses properly incidental to such resale." (Italics ours.)

Here there was no evidence that the sale was not fairly conducted nor is there any evidence of the unfairness of the resale price.

In considering the question of the power of the court to review the jury's decision, the law is well settled that ordinarily this is for the determination of the jury if there is a jury trial:

"Under rules applicable to civil actions generally, question of fact as to which there is a conflict in the evidence must ordinarily be submitted to to the jury, as, for example, whether goods were resold within a reasonable time or with reasonable diligence; whether notice was adequate or reasonable; whether the resale was fairly conducted; whether it was so conducted as to procure a reasonable price, and whether the price obtained was reasonable." 55 Corpus Juris, page 942.

And in 46 Corpus Juris, 717, it was said:

"The question as to what is a reasonable time within which to sell goods after the buyer has refused to receive them is to be ascertained by the character of the property and the circumstances and the market conditions in the particular case; this is usually a question for the jury."

The assertion of appellant that the question before the court is whether or not appellee exercised good faith and diligence in not beginning to resell until June 3rd is of necessity premised upon the assumption that had the resale started at the time of the breach then the damages would have been nominal.

If this assumption of fact is not sustained by the record then it is unnecessary for the court to pass upon the question sought to be argued. We submit that the assumption is not warranted. As we have shown in our statement of facts there is nothing in the record to show that a better price could have been obtained had appellee started to resell before he did. The quotations from Crowe's Price Reporter which had to do generally with other sales show that at the time the contract was breached there was a demoralized market and sales, particularly of miscellaneous lots of lumber of this character, were difficult to make. There is no evidence of the market price of rough boards or dimension lumber of random width and length during this period and in the absence of such evidence there is no presumption that an earlier sale would have reduced the amount of damage sustained. We therefore do not concede that the record even calls for any determination by the court of the points raised in appellant's argument.

Assuming, however, for the purpose of argument,

that an earlier sale might have produced a greater price, we inquire what, if any, evidence there is concerning the good faith and diligence of appellee in making the resale.

We have already called attention to the fact that the original breach arose out of a telephone conversation. We have shown that there were subsequent conversations between appellee and Powers, the representative of appellant, and also written communications between counsel for the appellant and the appellee which continued until the latter part of May at least. We submit that it cannot be said that while these conversations were going on it was incumbent upon the appellee to immediately attempt to unload this lumber on a falling market. However, even as to that appellee testified that he tried to sell this lumber in both Tacoma and Olympia and other places and that finally he had most of it transported to Tacoma where he thereafter sold it. This was evidence that he diligently sought to make a resale. This evidence was not disputed. Appellant offered no evidence whatsoever. The witness Barr fixed a market price, in part at least, substantially less than the price afterwards obtained. No evidence was offered to the contrary. It is true that appellee did not testify in detail as to the particular concerns to whom he tried to sell this lumber. Let the court bear in mind that this was ungraded rough lumber which had to be

remilled. Appellee testified that "I tried to find other orders where I could have it remilled and disposed of" (R. 72). The fact that on cross-examination he was not asked to testify in detail concerning these efforts could not change the necessary effect of his testimony.

Appellee was also justified in not starting to resell until June 3rd for still another reason. The original notice of the refusal of appellant to accept further deliveries was in a telephone conversation between appellee and Rothstein (R. 70). There were of course no witnesses to this telephone conversation and as a matter of fact, as is shown in the stenographic report of all the evidence on file herein. Rothstein denied that any such conversation had ever occurred. Had appellee begun to sell upon a declining market immediately after this conversation and had the market thereafter begun to rise again he might well have been subjected to a possible suit for damages based upon the claim that appellant had not in fact repudiated the contract. In such event he would have nothing to offer by way of defense except his unsupported testimony concerning this conversation. Appellee therefore did what any ordinarily prudent man would have done. He sought to obtain an unequivocal repudiation or recission by appellant of the contract which could not be disputed, by talking with Powers, who in some respect was a representative or agent of appellant, and by corre-

sponding with appellant's counsel. He finally secured from appellant's counsel sometime after May 15th a positive written repudiation of the contract. Certainly until this repudiation was definitely and unequivocally established he was under no duty to resell, since all he was required to do was to use reasonable diligence. He did begin to resell within two weeks after he secured positive evidence that appellant had elected to terminate the contract. We submit that nothing more is required.

In the case of *A. B. Small Co. vs. American Sugar Refining Co.*, 267 U. S. 233; 69 L. Ed. 597, the court even went so far as to approve the exclusion of evidence offered by the defendant of specific sales made on the market at a higher price previous to and during the month in which the resale was made. The reason given, among other things, was "that the buying was in relatively small quantities and also on what was deemed a 'hand-to-mouth' plane; and that the particular sales in December were of such character that they would shed no light on the fairness of the resale." The court also said:

> "What was proposed to be shown about particular sales in December was rightly excluded. The sales were of a kind that did not tend to establish a standard by which to judge the plaintiff's resale. *Besides, the real question was not whether the plaintiff got the best possible price, or as much as others got in special instances, but whether the*

resale was fairly made in a reasonably diligent effort to obtain a good price. To have admitted the proffered testimony would have tended to confuse and mislead the jury." (Italics ours.)

Inasmuch as appellant's position is predicated entirely upon Crowe's Price Reporter, this case is important. As we have shown, the figures upon which appellant relies were expressly stated not to establish a market and there is nothing to show the quantities or conditions with respect to these sales.

A. B. Small Co. vs. Lamborn & Co., 267 U. S. 248; 69 L. Ed. 597, was a companion case to the *American Sugar Refining Co.* case. In this case the defendant offered the testimony of wholesale dealers in the area concerning the price received by them on particular sales to retail dealers at about the time of the resale which evidence was rejected by the Court. The Court held this not error in the following language:

"We think the ruling was right. The particular sales were in relatively small quantities, many of them under 300 pounds and had no probative bearing on the fairness of the resales. The real question, as stated in *A. B. Small Co. v. American Sugar Refining Co.* supra, was whether the resales were fairly made in a reasonably diligent effort to obtain a good price, *and not whether the plaintiff got the best possible price* or as much as others got in particular instances. The unsettled state of the market and the differences between selling small quantities to retail dealers to satisfy immediate needs and selling large quantities to wholesale dealers who

had an oversupply made it necessary to confine the evidence to the real question." (Italics ours.)

This Court reached the same conclusion in *San Francisco Iron & Metal Co. vs. Sweet Steel Co.*, 23 Fed. (2d) 783, which involved a contract for the sale of a substantial amount of steel rails. For the purpose of showing that the market price was higher than the contract price at the time of the breach, the defendant introduced evidence of certain other sales that were made. Concerning this, this Court said:

> "Those sales were of small lots sold at retail and they have little value in determining what was the market of the rails when offered in wholesale lots."

These cases seem to dispose of the argument that the prices reported in Crowe's Price Reporter conclusively show lack of diligence or good faith upon the part of appellee. They also establish the fact that, if good faith is established, the price obtained at the resale is sufficient to support a verdict, without other evidence of market price. Crowe's Price Reporter for this period does not show the amount of goods sold or to whom sold, and indeed does not even show the price of lumber purchased under a contract of this character. Appellee was here confronted with the problem of disposing of eighteen carloads of this lumber in a rather isolated section and without the prestige of being supplied by a large concern with trade standing. The

quoted excerpts from Crowe's Price Reporter heretofore referred to show the effect of this situation. For instance, on May 1st, which covers the preceding two weeks, the publication states that "during the past two weeks the small plants having mediocre timber and limited manufacturing facilities have been first to feel price reductions that have actually hurt." And again on April 3rd the publication states that "the further down the line you go in the way of service, that is, the less the mill has to offer in the way of giving the buyer what he wants, the less they are having to take for their goods." Under the doctrine of the *Small Company* cases, supra, the figures in Crowe's Price Reporter would not be indicative of anything unless information was given concerning sales transactions by sellers situated in somewhat the same position as was appellee when this contract was breached.

An extended review of the specific facts in cases involving the application of these principles would seem to be unnecessary, since each case depends upon its particular facts. Appellant seems to assert, however, that the Washington decisions as a matter of law require a reversal of the decision of the Court below. A review of them therefore seems to be appropriate.

THE WASHINGTON CASES

Hess vs. Seitzick, 95 Wash. 393; 163 Pac. 941, is cited. In that case the only thing decided was that the lower Court erred in instructing the jury that, if the jury found that the buyer had breached the contract, then it should return a verdict for the difference between the contract price and the amount which the buyer realized upon a sale made upon a declining market three months after rejection of the goods by the buyer. The Court called attention to the fact that there was evidence in the case "that the butter could have been resold at the time of, or within a reasonable time after the rejection, and in fact for about two months thereafter, at considerably more than the contract price, of which, so far as the evidence goes, the respondent failed and refused to avail himself." Notwithstanding this the issue was not submitted to the jury. All that was decided was that this was a question for the jury.

Here the issue was submitted to the jury and here also, unlike the *Hess* case, there was evidence of efforts made by Feak to sell the lumber and no evidence that he did not obtain the best price under the circumstances.

Washam vs. Wood, 177 Wash. 183; 31 P. (2d) 508, is also cited. This case was tried before the Court and not before a jury, and under Washington practice the State Supreme Court may consider such cases de novo,

although the usual presumption of correctness is given to findings of fact of the Court below. The item of $200.00 damage was disallowed for the reason that "according to respondent's own testimony the market value of the wheat when it was threshed was $34.00 per ton, the contract price." In other words, the seller conceded that he could have sold the goods at the time and place of breach at the contract price. Obviously under such a concession he could not recover damages. No such concession was made here.

Hartman Pacific Co., Inc. vs. Estee, 127 Wash. 151; 219 Pac. 867, is cited. This case was also tried before the Court and not before a jury. This involved the resale of salmon. The first sale was made four months after notice of election to resell and the last sale sixteen months thereafter. The manager of the seller testified that he could have sold the goods at the prevailing market price, which was conceded to be about $2.00 per dozen, during the first two months of the period, and other witnesses, whose testimony was not contradicted, testified to the same effect. In other words, there was no conflict in the record on the question.

Fosseen & Co. vs. Kennewick Supply & Storage Co., 144 Wash. 67, 256 Pac. 779, is cited. This, unlike the other cases, was a jury case. In that case, however, the only evidence introduced was the market price of the product at the time of resale "some two years later

than the time of the breach." The Court properly concluded that this was too remote from the time of the breach and also called attention that the evidence showed that the market price was subnormally high at the time of the purchase but "*that had it been sold at any time in the year* 1923 *the loss would have been nominal.*" There is no such evidence here.

The case of *Hughes vs. Eastern Ry. & Lbr. Co.*, 93 Wash. 558, 161 Pac. 343, is also cited and quoted from. This case directly supports the position of appellee. The suit was a suit for damages brought by the seller against a buyer who had refused to receive certain logs. The defendant by way of defense sought to show that, after the breach, the seller had sold the logs to another concern at a price more advantageous than the original contract and that therefore no loss had been sustained. The lower Court refused to admit the evidence. This was held error. After stating the general rule set forth on page 11 of appellant's brief that the seller must be diligent, the Court said:

> "In the case at bar respondent was not deprived of his goods by the breach of defendant. It follows that evidence of a market was competent and should have been received. *A resale is competent evidence to prove a market.*" (Italics ours.)

This quotation shows that, in Washington at least, whatever may be the rule in some other jurisdictions, that if ordinary diligence is shown it is sufficient for

the seller to prove the price received at the resale without general evidence of the market in the product.

The Washington Court has not hesitated, when the occasion required it, to disregard the general rule that the measure of damage is the difference between the market price and the contract price. *Poston vs. Western Dairy Products Company*, 179 Wash. 73; 36 P. (2d) 65, involved the breach of a contract between a milk distributor and a producer to purchase the producer's milk. The contract was breached by the distributor, and the producer, in order to minimize his loss, formed a distributing organization. In a suit brought by the producer for damages he was allowed to include the cost of setting up the distributing organization and loss of sales. The Washington Court in considering this said:

> "Appellant contends that the measure of damages applicable was the difference between the contract price and the market value of the milk. The difficulty with the application of the rule in the instant case is that there was no market for bottled milk of the Stadocona and Waikiki quality, except on the doorsteps of householders in Spokane. When, through the acts of appellant, respondents were deprived of that market, they faced the alternative of selling their product as bulk milk or building up a distributing organization of their own. The former course spelled ruin, for, as bulk milk, their product would have returned little more than half of the daily cost of operating their dairy. They chose the latter alternative with the result that, within ninety days, they had resuscitated their business to

a volume equal to that just prior to the time appellant breached the contract. None the less, appellant contends that respondents, under the rule, were bound to sell their product as bulk milk and take their loss. We do not think the rule is so rigid as all that. *After all, the underlying theory of damages is fair compensation for the injury—not protection for the one inflicting it.*" (Italics ours.)

While we do not contend this case to be in point upon the facts, the facts in the two cases has some analogy. Feak was not a manufacturer of lumber, of which fact the appellant was advised.

Crowe's Price Reporter establishes the difficulty of a person, operating as did Feak to sell this product, which was second-growth timber, and which under the contract was purchased by Feak without grades and of random lengths. The principle of the *Poston* case is applicable although the facts to a certain extent are different.

Likewise the Washington Court has held, in a considerable number of cases, that where there is no market at the place of delivery or where the goods cannot reasonably be resold, that the seller is entitled to recover the full contract price.

State Finance Company vs. Hamacher, 171 Wash. 15; 17 P. (2d) 610;

Foster vs. Montgomery, Ward & Co., 24 Wn. (2d) 248; 163 P. (2d) 838;

Parks vs. Elmore, 59 Wash. 584; 110 Pac. 381.

In *Parks vs. Elmore*, supra, the Court also made the following observation:

> "If the appellant knew of a market he was morally obligated to point it out to the respondent, and failing in this, it would seem that he was not in the best possible position to claim lack of diligence on the part of respondent."

Appellant now relies on Crowe's Price Reporter, which is published in Portland and which city is the principal place of business of appellant. If the market was as claimed by the appellant, then was he not obligated to inform the appellee of this market, if one existed?

The plain truth of course is that there was in effect little or no market for lumber of this kind situated in this locality. The justifiable and necessary inference from the record is that the appellant, when the market began to slide, recognized what a difficult task it would be to handle this lumber on the market and that that was the reason why appellant, without just cause, repudiated the contract. It is clear also that the reason the appellant offered no evidence upon this issue, which was specifically tendered to it by the pleadings previous to trial, was that it realized that the appellee had done an extraordinarily good job in minimizing damages, and that if any evidence was offered it would simply accentuate and prove that unusual diligence had in fact been exercised.

OTHER AUTHORITIES CITED BY APPELLANT

We think it is unnecessary to undertake a detailed analysis of the facts of certain miscellaneous decisions of some other courts cited in appellant's brief, since each case involves different facts and circumstances. However, a short discussion may be justified.

In *Shelton v. Argos Mercantile Corp.*, 194 App. Div. 472, 185 N. Y. Supp. 513, the uncontradicted evidence was that the seller could have sold the goods in Cuba at a price exceeding the contract price, but instead of this he chose to speculate and shipped the goods to France where a portion of them at least was lost at sea. The conceded fact that the seller chose to speculate instead of selling in an available market completely makes the case inapplicable here.

It is asserted that *Chozo Yano, et al. v. Ledman, et al.*, 188 N. Y. Supp. 764, is in all fours with the case at bar. This decision was by a City Court of New York and, as is pointed out in the brief, was thereafter reversed for reasons here immaterial. The Court concludes that because "the market as proven upon the day of delivery was $19.50 apiece" that therefore damages based upon a resale made thereafter could not be allowed. The facts with respect to the proof do not appear in the opinion but the decision in any event completely ignores the question of diligence and good

faith and is directly contrary to the statement of the Supreme Court of the United States in the *American Sugar Refining Company* case, supra, where that Court said that the question "was not whether the plaintiff got the best possible price, or as much as others got in special instances, but whether the resale was fairly made in a reasonably diligent effort to obtain a good price."

Worcester Bleach & Dye Works v. Dlugasch, 181 N. Y. Supp. 44, and *Magnes v. Sioux City Nursery & Seed Co.,* 59 Pac. 879, are also cited. The *Worcester* case expressly held that "it is unnecessary for us to determine whether, if there was an available market in New York City * * *, the plaintiff would be entitled to recover the difference between the agreed price of the chemicals and the price he actually obtained * * *." The Court then stated that, assuming that the plaintiff could sell as defendant's agent, he could still not recover for cartage, storage and personal expenses in view of the fact that there was no evidence in the record that such items were necessary. Two judges concurred in the result.

In the *Magnes* case no evidence was introduced concerning the resale. As stated by the Court "how, when, or to whom, and whether at public or private sale." The Court then rightfully concluded that good faith was not shown. Here the price, the time and the buyer

to whom the goods were sold were all identified and established by the evidence.

Derami, Inc. v. John B. Cabot et al., 273 App. Div. 717, 79 N. Y. S. (2d) 664, is elaborately quoted from on pages 20 and 21 of appellant's brief. The only thing which was decided there was that evidence of a resale could not be used to establish a market price. This is shown by the quotation on page 21 of appellant's brief where it is said "there is no testimony in the case by anyone familiar with the business concerning whether there was an available market for the goods. If there was no such market, the price on resale could not be regarded as evidence of market value." If this is the New York rule then it is directly contrary to the rule announced by the United States Supreme Court in the *A. B. Small* cases before referred to, which, as we have shown, limit the inquiry to the question of whether or not reasonable diligence was shown, and is also directly contrary to the statement of the Washington Court in *Hughes vs. Eastern Ry. & Lumber Co.*, 93 Wash. 558-562, 161 Pac. 343, where the Court said "*the resale is competent to prove a market.*"

It is also contrary to the decision of this Court in the case of *San Francisco Iron & Metal Co. vs. Sweet Steel Co.*, 23 Fed. (2nd), 783, where this Court quoted the following paragraph from Ruling Case Law:

> "He may resell at any time and in any state of the market, and the fact that he refrains from selling them for several months on a falling market does not prevent him from recovering in an action against the buyer for the deficiency."

The New York Court in effect admits that the decision is inconsistent, in part at least, with the decision of Circuit Judge Larned Hand of the Second Circuit in the case of *Farrish Co. vs. Madison Distributing Co.*, 37 Fed. (2d) 455, in which case it was held that if diligence was shown it was not necessary to show an available market other than evidenced by the resale.

In *Arkansas Shortleaf Lumber Co. vs. Hemler*, 281 Fed. 914 (8th Circuit), it was held that where there was no evidence of the market price of the goods which the seller had resold after a repudiation by the buyer, that the price obtained at the resale should be regarded as the market price, the seller having used due diligence and made all reasonable efforts to obtain a fair price.

See also Section 46, American Jurisprudence, page 710, where it was stated, among other things, that "the amount of the resale is, properly speaking, evidence of the market value of the goods," and where it was further stated that if the resale was fairly conducted and there was no evidence of its unfairness "the amount received in the resale is accepted as conclusive on the question of market value of the subject matter of the sale."

The Court will find this question elaborately considered in a note in 44 A. L. R. and particularly a discussion beginning on page 308 under the sub-heading of "presumption as to resale being for full market value."

This note was supplemented in 119 A. L. R. 1141 with a reference to many decisions of the State and Federal Courts and also to Canadian decisions.

Frankel vs. Foreman & Clarke, 33 Fed. (2d) 83, a decision of the Second Circuit is also cited. The real basis of this decision was the admitted failure of the seller to resell certain coats on November 16th at the height of the season, which was followed by a sale on December 7th where there was a low market. The quotation from the appellant's brief, "that if the testimony showed that the market had fallen between the date of the breach and the time of resale, then there could be no recovery based upon the resale," (App. Brief 23) must be read in connection with the conclusion of the Court that the uncontradicted evidence there showed lack of diligence. If the decision is otherwise construed, then it has been overruled by *Farrish vs. Madison Dist. Co.*, 37 Fed. (2d) 455.

If the opinion be construed otherwise, then it is also squarely in conflict with the two *Small* cases which we have referred to which specifically hold that the plain-

tiff is not required to show that he "got the best possible price" or with the statement of this Court in the *San Francisco Iron & Metal Co.* case to the effect that "the fact that he refrains from selling them for several months on a falling market" will not defeat recovery.

Obrecht vs. Crawford, 175 Md. 385, 2 Atl. (2d) 1, simply announces the general rule that a resale must be made within a reasonable time and that reasonable care and diligence must be used. The case does not deny the right of a diligent seller to take reasonable time to resell even though on a falling market.

Crawford vs. Dahlenberg ,221 Mo. App. 600, 283 S. W. 65, is obviously no authority here. That case involved a commodity which had no available market at the place of acceptance. The seller shipped the goods to the nearest available market with definite instructions to sell at not less than th contract price. It was held that this limitation showed lack of diligence. This conclusion seems quite sound. The facts here are entirely different. Feak got considerably more for this lumber than the market in May and June, as testified to by the witness Barr, which certainly showed that he exercised diligence. There is no evidence that he put a minimum price upon the resale price.

CONCLUSION

In conclusion attention is called to the apparent discrepancy between the points as stated in appellant's brief and one or two of the cases cited. The statement of the points involved correctly state the issue and that is whether there is evidence to support the jury's finding that appellee exercised diligence and resold in good faith. The idea is suggested on pages 20 to 24 of appellant's brief that the seller must, in addition to showing diligence and good faith, also show that there was a market and that the resale was not less than the market. We have already discussed this in detail but we now refer to it again in order to point out that the statement of points to be relied upon does not cover any such contention. Therefore under familiar rules, the point may not now be considered.

It is submitted that the judgment should be affirmed.

Respectfully submitted,

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